

BEFORE ARBITRATOR T. DAVID WOO, JR.  
STATE OF HAWAII

|                                     |   |                    |
|-------------------------------------|---|--------------------|
| In the Matter of the<br>Arbitration | ) | Grievance of ..... |
|                                     | ) |                    |
|                                     | ) |                    |
| Between                             | ) |                    |
|                                     | ) |                    |
| HAWAII GOVERNMENT EMPLOYEES         | ) |                    |
| ASSOCIATION, AFSCME, LOCAL 152,     | ) |                    |
| AFL-CIO,                            | ) |                    |
|                                     | ) |                    |
| Union,                              | ) |                    |
| And                                 | ) |                    |
|                                     | ) |                    |
| STATE OF HAWAII, DEPT. OF PUBLIC    | ) |                    |
| SAFETY, .....                       | ) |                    |
|                                     | ) |                    |
|                                     | ) |                    |
| Employer,                           | ) |                    |
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**ARBITRATION DECISION AND AWARD**

The undersigned Arbitrator was selected by the parties as of January 13, 1998 to arbitrate the above-captioned grievance upon the issues hereinbelow stated.

The arbitration hearing of the grievance was held on May 27, and May 28, 1998 in the 14<sup>th</sup> Floor Conference Room of the Leiopapa A Karnehamaha Building, Honolulu, Hawaii. Attorney Darwin L.D. Ching represented the Grievant and Deputy Attorney General James E. Halvorson represented Employer.

....., ....., ..... and ..... testified on behalf of the Employer; and ....., ....., ....., ....., ..... and ..... testified on behalf of the Grievant.

In addition to the testimony elicited from witnesses in this proceeding, and the documents introduced through witnesses, the record in this case was augmented with the decision of Arbitrator Ted Tsukiyama in a related case, In re Department of Public Safety, State of Hawaii and HGEA (Grievance of .....) , the transcript of the proceedings therein, and the transcripts of depositions of witnesses, some who testified in the hearing of the instant case, and one witness who did not.

The testimony of the witnesses was transcribed by Cynthia M. Mandichak of Honolulu Reporting Services. Full opportunity was afforded the parties to present evidence, examine and cross-examine witnesses and to present final argument through post hearing briefs. Counsel were found to fully, fairly and competently present and represent the respective positions of their clients.

### **ISSUE**

The parties stipulated that the arbitrator has jurisdiction to consider and resolve the following issues (1) Was the Grievant terminated for just and proper cause and in accordance with the Contract? (2) If not, what is the appropriate remedy?

### **RELEVANT CONTRACTUAL AND STATUTORY PROVISIONS**

Article 8- Discipline:

Regular Employees shall not be disciplined without proper cause. Grievances regarding these matters shall be handled in accordance with the provisions of Article II, Grievance Procedure.

### **FACTS**

The Grievant, ....., has been employed by the State of Hawaii, Department of Public Safety, since 1987. On August 16, 1993 he was promoted to the position of General Construction and Maintenance Supervisor II (hereinafter, "GCMS") at the ....., As GCMS, Grievant was in charge of a building maintenance unit headed by a Building Maintenance Supervisor, who, at the time of the incident in question, was ....., Grievant also directly supervised a number of skilled tradesmen, including ..... (hereinafter, ".....") a Maintenance Mechanic II. Grievant's immediate supervisor was ....., the Institutional Facilities Superintendent.

On October 17, 1994 ..... was assigned to repair the central air conditioning system for the Special Needs Facility (sometimes referred to by PSD personnel and inmates as the "high"; sometimes as the "SNF"). The "high" is the prison facility where high security inmates, protective custody inmates and inmates with acute mental health problems are housed. The air conditioning unit, a large 125,000 BTU central air conditioning system (the "A/C"), is located in the basement of the "high" in an area designated as Module A. Since there are no windows in the Special Needs Facility, the A/C is essential to the comfort of the inmates who reside, and PSD employees who work, in the SNF. Access to the basement of Module A is by way of a pair of steel doors, approximately 1 3/4 inches thick. The door is located in back of the building, in a secured area which is inaccessible to inmates unless they are supervised or under security constraints. The steel doors are secured with a large institutional lock.

..... was assisted that day by a "work line" consisting of three inmates from the ..... prison. At the beginning of the day, ..... checked out a number of tools from the ..... Maintenance Facility's tool room which were taken to Module A. The tools which ..... checked out from the tool room were listed by ..... on a log sheet which he then gave to ..... (hereinafter, "....."), the facility's tool control officer. The following tools were listed on the log sheet:

One set of torch tips, two pipe wrenches, one extension cord, two 1/4- inch socket sets and driver, one tap wrench, one 9/64-inch drill bit and one drill.

Towards the end of the work day the A/C was still inoperable and ..... needed to return the work line inmates to the ..... prison. Prior to leaving the "high" with his work line, ..... informed a certain Lieutenant ..... that an additional two to three hours of work was needed to finish the repairs to the A/C. .... received approval for overtime to finish the repairs to the A/C unit from Residency Section Supervisor ....., but he did not return to Module A to finish the work. According to two of the inmates working in ..... 's work line that day, ..... inexplicably changed his mind and returned his workline to the ..... prison. .... then returned to the maintenance office where he was confronted by ..... who asked ..... to account for the tools listed on the log sheet. .... informed ..... that he left the tools up at the "high." .... then took the log sheet containing the list of tools to his supervisor, ....., and informed ..... that ..... had failed to return the tools. In turn, ....., informed his supervisor, the Grievant, of that fact. Grievant told ..... that he would take care of the matter, and instructed ..... not to tell ....., the IFS, stating that if necessary, he, Grievant, "would take the burn." All of these short, informal meetings occurred shortly before the end of the work day, which was 2:00 p.m.

However, Grievant forgot to order ..... to retrieve the tools. Grievant also failed to determine precisely what tools ..... had left Module A. The next day there was a lockdown at ..... Prison and no further work was performed on the air conditioning system. .... testified that on the 18<sup>th</sup> he reminded ..... about the tools and "left the ball in his hand." .... said nothing to Grievant about the unreturned tools. The day after, October 19, 1994, .... did not report to work. Grievant again forgot that the tools had not been retrieved and failed to assign anyone to retrieve the tools. ...., Grievant's supervisor, happened to look into the basement of Module A and observed a large number of unsecured tools. .... ordered ..... to dispatch personnel to retrieve the tools immediately. It was then discovered, unbeknownst to Grievant, that in addition to the tools checked out from the tool room, ..... left a number of tools from the maintenance mechanic's shop. An inventory of the tools recovered from the SNF revealed that in addition to the tools listed on the log sheet, ..... had left behind a fully assembled acetylene cutting torch set, a hacksaw, a pipe wrench, a 7-inch

vise grip plier, a 9-inch vise grip plier, a sheet metal hammer, a 33-inch crowbar, a 24-inch crowbar, a die grinder set, a chisel, three other wrenches, a ballpeen hammer, and other miscellaneous tools. Virtually all of these tools were classified as "Class A" tools, i.e., extremely dangerous tools which can be used by inmates as dangerous weapons or instrumentalities of escape.

An investigation was undertaken by a certain Sergeant ....., ACO IV. In his report, Sgt. .... concluded:

[T]hat GCMS II ..... failed to initiate the appropriate action by ensuring the proper return of the aforementioned Class A & B tools, when he was informed by GCMS ..... That this failure is emphasized by GCMS II ..... 's unwillingness to report as mandated to IFS ..... and is more over (sic) deemed a refusal to maintain the level of supervision entrusted to him, which includes the enforcement of all policies and procedures by his assigned subordinates.

That the incredulous actions of both Maintenance Mechanic Supervisor ..... and General Construction Maintenance Supervisor ....., are in direct violation of the Standards of Conduct....

On January 20, 1995 DPS informed Grievant that it was reviewing his case, and of his role of his right to a Pre-Disciplinary Due Process Hearing:

We are in the process of determining whether there is just and proper cause to take disciplinary action against you for violating the following Department of Public Safety, Corrections Division, Standards of Conduct:

Article III, Section 11, Professional Conduct and Responsibilities, E2.  
General Responsibilities - Correctional employees shall at all times take appropriate action to create and maintain a feeling of security within the facility assigned.

Article III, Section II, Professional Conduct and Responsibilities, E3.  
General Responsibilities - Correctional employees shall at all times take appropriate action to reduce the opportunities for escape of inmates.

Article III, Section 11, Professional Conduct and Responsibilities, E10. General responsibilities - Correctional employees shall at all times take appropriate action to enforce all Federal and statutory law violations as well as departmental and branch Rule, Directives, Policies and Procedures, and these Standards of Conduct and report any violations thereof.

Article III, Section III, Rules, C. Class C Rules, C6. Reports -

Corrections Officers and all other employees shall promptly submit such reports as are required in performance of their duties or by competent authority.

Synopsis: On October 17, 1994 you allegedly allowed a number of Class A and Class B tools to remain in the module- A basement at the ..... Special Needs Facility for approximately two days. Furthermore, you failed to report the incident and also instructed another employee not to report it.

Grievant's Pre-Disciplinary Due Process Hearing was held on February 9, 1995. Grievant was also granted a pre-dismissal hearing before hearings officer Raymond Brewer on March 29, 1995. In a letter dated March 16, 1995, George Iranon, the Director of DPS, informed Grievant that he would be dismissed from employment as of March 31, 1995, and that effective immediately Grievant was placed on leave without pay. .... was also dismissed effective February 12, 1995. No other employees of the Department were disciplined for their conduct in this incident.

On May 18, 1995 the Union filed a grievance on .....s behalf. On August 25, 1995 the Step 1 Grievance was denied. On September 8, 1995 the Union filed a Step 2 Grievance which was denied on January 4, 1996. On January 22, 1996 the Union filed a Step 3 Grievance which again was denied on October 31, 1996. On November 19, 1996 the Union informed the Employer of its decision to arbitrate the grievance.

## **DECISION**

### **A. Disparate and Discriminatory Discipline:**

The record confirms that a number of people were guilty of lapses in judgment, or were in a position to rectify or ameliorate the problem. Yet, only Grievant and ..... were disciplined. For reasons discussed herein, I find that the disciplinary processes employed in this case were flawed and cannot be reconciled with the "just cause" provisions of the Collective Bargaining Agreement. The facts show that not all persons involved in this episode were treated equally. The issue of disparate discipline was also a matter of concern to Arbitrator Tsukiyama who discussed this issue at some length in the ..... grievance. Arbitrator Tsukiyama was convinced that ..... and Grievant were the victims of disparate or discriminatory discipline. His decision is quoted below, in pertinent part:

3. Disparate or Discriminatory Discipline. The Union argues with some considerable merit that there were others who failed to uphold their responsibilities for tool control and accountability and yet only Grievant (and his supervisor ..... ) were disciplined. The Arbitrator has reviewed and adjudged this case on the basis and assumption that Employer is serious about strict enforcement of all policy, rules and procedures to maintain safety and security in the facility, and if this premise be true, then Employer has failed to warn, reprimand or otherwise discipline other employees also

charged with tool control and security who knew or should have known of Grievant's abandonment of his tools and who ignored or otherwise "dropped the ball" in failing to seek recovery or safeguarding of the tools.

The heaviest weight of culpability in this case outside of Grievant fell upon ....., but he was summarily punished by discharge. But there were others who knew about the contraband tools and did nothing. Tool Room Clerk .....s responsibilities for the checked out tools did not end when he reported the fact to his supervisor ..... on the afternoon of October 17. Nothing in the evidence shows that within the next two days he made any attempt to inquire or to seek recovery of the tools from anyone. Likewise, his supervisor ..... was not absolved of further accountability for the contraband tools by his reporting the fact to his superior ....., since this Tool Room came within the sphere of his supervisory jurisdiction and he should have exerted both interest and effort the next few days seeking to recover those tools if he chose not to report the matter to Superintendent ..... as requested of him by .....

He should have been reprimanded by .....

The ACO's manning Command Post #27 had no authority to approve storing work tools overnight at the worksite but they were responsible to check in tools when worklines passed through CP #27 to return to Medium Security. The big question here is how or why ACO ..... permitted Grievant and his workline to pass through CP #27 without returning or accounting for the work tools checked out that morning, since his testimony was silent on this point and Grievant's version that ACO ..... accepted his story and passed him through strains credulity. It was incumbent upon ..... or other monitor of CP #27 to have reported the missing tools and then pursued the matter within the next few days.

Watch Commander Lt. .... of Building Control who had requested the AC repair job in the first place ended his watch on October 17 believing Grievant would return to the worksite with the missing parts to complete the repair job, but learning the next day that the AC at Module A had still not been repaired, he yet neglected to inquire as to the status of the AC repairs which would have then revealed the abandoned tools at the jobsite. Even Superintendent ..... who was present at the jobsite on October 17 "breathing down" Grievant's neck to finish the repairs apparently made no inquiry the next day as to the status of the high priority AC repair job, which would have revealed the "contraband tools" left at the jobsite one day earlier. From the top down there was apparently no interest shown in seeking early completion of a Priority A work order arising out of a critical AC break-down at Module A, which would have led to an earlier discovery of the abandoned tools. There was also evidence that private contractors performing repair work within secured facilities were allowed to leave their tools overnight at the worksite. If this be true, such would constitute direct violations of Policies 893.08.27 and COR-08.21 as well as unfair, discriminatory treatment of non-uniformed facility personnel, for which Facility management should be critically admonished for permitting or tolerating the practice to occur.

The most damning development arising out of Grievant's neglect was Sgt. ....'s discovery the next day (Oct 18) of a screwdriver and wrench down at the

Maintenance Mechanic Shop at Medium Security which should have been part of the tools left by Grievant allegedly locked up in the Module A basement up at High Security. Sgt. .... traced the tools to Grievant, but then merely admonished him and asked him to submit a "To-From" Report. Sgt. .... discovery would have not only revealed the "contraband tools" left at the jobsite but also the fact that the jobsite had apparently been unlocked or broken into so that some of the tools were unaccounted for and openly accessible at large within the .... Facility! The most feared consequence sought to be prevented by the Policy and Procedures had apparently occurred, but no one in the chain of command at the Facility responded to this crisis by pursuing immediate recovery of the "contraband tools" and tracking down any other loose tools such as those found by Sgt. ....

Compliance with and enforcement of Policies for tool control and accountability is a group and collective responsibility of all involved in the process, not just the workline supervisor or he who signs out the tools. The common reaction and phenomena found in this case was "to let John do it," "pass the buck," "not my kuleana" or to finger point someone else. Prison safety and security cannot be ensured or achieved that way, and management authority and control at the Facility would be compromised if serious breaches of security procedures were to be overlooked or tolerated. Thus, if Employer is truly serious about strict enforcement of the Policy, then it should be prepared to hold all to whom the Policies depend upon for administration and enforcement to be responsible and accountable for the achievement and preservation of the Policy objectives. **But in this case, Employer is found to have failed to discipline, to have at least warned or reprimanded, all others who had knowledge of the abandoned tools at the jobsite and of the unfinished high priority repair order, who yet did nothing towards immediately recovering or at least accounting for the tools which had now become "contraband." In so failing to hold those others also accountable and disciplinable (even to a lesser degree) punishing only Grievant (and his supervisor) by discharge must be considered disparate discipline and a flaw in the administration of disciplinary "just cause."** (Emphasis added).

As viewed by this Arbitrator, the facts in the instant grievance differed slightly due to new or additional evidence introduced in the instant case, or due to the way this Arbitrator interpreted the evidence.

In my view, ....'s culpability was equivalent to Grievant's. Unlike the .... grievance, testimony elicited in the instant arbitration revealed that both .... and Grievant believed that if .... had resumed work on the air conditioning system immediately the next morning, no-one would be the wiser and there would be no problem. Doubtlessly, this would partially explain their lackadaisical attitude toward retrieving the tools. Neither of them anticipated that there would be a lockdown the next day, which would totally frustrate what they anticipated would be another routine work day. Neither of them was aware that .... had left a fully assembled acetylene cutting torch, hack saws, crowbars, chisels, screwdrivers, hammers and numerous other Class A tools in the basement of Module A. They both thought that the tools that .... had failed to return were tools from the tool room, none of which

were class A tools. Moreover, the following day (the day of the lockdown) ..... reminded ..... of ..... 's failure to return the tools and ..... did nothing. .... knew that Grievant had a tendency to be forgetful, but did nothing to remind Grievant about the unrecovered tools the next day. .... himself forgot to follow up about the tools. Moreover, as noted by Arbitrator Tsukiyama:

[T]his Tool Room came within the sphere of [.....'s] supervisory jurisdiction and he should have exerted both interest and effort the next few days seeking to recover those tools if he chose not to report the matter to Superintendent ..... as requested of him by .....

If, as it appears, discipline in this incident was not applied consistently, it would violate a fundamental element of just cause. In, Elkouri & Elkouri, How Arbitration Works, M. Volz and E. Coggin, (Co-editors, 5<sup>th</sup> Ed.) at page 934, the authors stated:

It is generally accepted that enforcement of rules and assessment of discipline must be exercised in a consistent manner; all employees who engage in the same type of misconduct must be treated essentially the same unless a reasonable basis exists for variations in the assessment of punishment (such as different degrees of fault or mitigating or aggravating circumstances affecting some but not all of the employees. In this regard, Arbitrator Benjamin Aaron declared: "Absolute consistency in the handling of rule violations is, of course, an impossibility, but that fact should not excuse random and completely inconsistent disciplinary practices (footnotes omitted).

The next question, therefore, is whether the actions of other employees who escaped discipline can be viewed as similar to, or equivalent with, Grievant's actions. I conclude that other employees engaged in similar misconduct. Grievant's lapses in failing to address the problems caused by ..... 's failure to return the tools to the tool room fall in the realm of negligent, not intentional, conduct. While negligence on the part of employee can be so egregious as to warrant discharge of an employee, it is my opinion that this is not such a case. In viewing the totality of the circumstances surrounding the incident for which Grievant was discharged, this arbitrator believes that based on Grievant's perception of the facts at the time, he is not guilty of gross, or wilful and wanton, negligence.

In In re Ingalls Shipbuilding Corp., 37 LA 955 (Murphy, 1961) the arbitrator defined gross negligence as "almost a wilful disregard of what is being done and an almost complete inattentiveness to the job with opportunity to foresee the likely consequences of the conduct":

There are degrees of recklessness and negligence. I do not place grievant's conduct in the gross negligent category-- gross negligence is almost a wilful disregard of what is being done and an almost complete inattentiveness to the job with opportunity to foresee the likely consequences of the conduct.

\* \* \* \*



A good faith mistake not involving a reckless attitude, but amounting to oversight on one simple step in a complicated process, is something that is likely to happen to any person on any job. Serious mistakes without wilfulness or recklessness or without wanton disregard of life, health or property are made by people in professions and other occupations and jobs daily without permanent loss of their employment. High level management in government, industry and private affairs make such mistakes of judgment causing losses. The rule in our society as I see it is normally not to deprive a person of his job when he falls down in the above manner on one occasion after four years of faultless work. He may be disciplined but normally he is given another chance. Id. at 954- 955.

Whether or not Grievant can be deemed to have been guilty of gross negligence or simple negligence is dependent on a variety of factors, including:

"the patency of the hazards to be avoided, the obviousness to the employee of the degree of care required... the apparent risk of bodily injury or damage to property incident to the activity undertaken by the Grievant, and the apparent severity of the injuries or magnitude of the damages to be anticipated should any mishap occur; the employer's rules; the employer's previous disciplinary responses to similar employee negligence under similar circumstances; or other relevant factors. In re T. W. Recreational Services, Inc. 93 LA 302 (Richard, 1989).

Grievant believed that ..... had failed to return fairly innocuous tools which had been taken from the tool room, a list of which appeared on a log sheet. Other than ....., no one, including ..... and ..... realized that highly dangerous implements such as an acetylene cutting torch had been left in the basement of the SNF. The Grievant reasonably expected that if anything truly dangerous had been left there that ..... would have been caught at CP #27 and questioned about the absence of the tools. Even if that presumably slim possibility emerged- which it did- ..... and Grievant apparently thought that the tools would be safe overnight. There was a presumption on the part of everyone involved that the basement of Module A was an area in which inmates could not gain admission without being accompanied by security or authorized supervisory staff. Also, there was a reasonable expectancy that the door was locked. There was testimony that the steel doors opening to the basement of Module A are routinely checked at least three times a day by roving security guards. Because of the nature of the lock, and of the massive key used to open that lock, a quick visual inspection would readily reveal whether the door is locked or unlocked. Moreover, only a few weeks prior to this incident a private contractor, ....., had been involved in repairs to an underground diesel fuel storage tank located in close proximity to Module A. .... was permitted to store a large box of tools in the basement of Module A at night throughout the duration of the project. Under these circumstances, the patency of the risks involved were not obvious to Grievant, who labored under a mistaken belief that the tools were class B tools and that they would be safe overnight. Notwithstanding his subsequent forgetfulness, Grievant's misconduct did not amount to wilful or wanton negligence.

We must not lose sight of the fact that it was ..... who created the hazardous condition by abandoning his tools. He alone was guilty of intentional misconduct. He alone knew the extent of the hazards involved. The other persons involved were negligent in failing to ascertain the risks created by .....'s misconduct, and to rectify the situation. In cases such as this, where there are numerous persons who are equally negligent, arbitrators have set aside discipline on the grounds that the a Grievant's discipline was harsher than that inflicted on others found to be equally negligent. In In re T. W. Recreational Services, Inc. 93 LA 302 (1989) Arbitrator Richard stated:

Whether damages actually occurred, or the extent of the damages occurring, is not deemed a proper basis to distinguish between employees guilty of the same offense in such cases. Nor does this Arbitrator deem it to be a proper basis to distinguish between employees guilty of negligence. Rather, ***all employees guilty of negligence under the same circumstances, or of the same degree of negligence with the same potential for damages to persons or property, whether or not such damages occur, should be disciplined to the same degree of severity***, unless something in their records gives legitimate reason for disparate treatment, e.g: some record of similar offenses, previous progressive discipline, length of service, etc. Like offenses, by like employees, are to be treated in a like manner unless other relevant factors justify different treatment. The extent of the resulting damages is not such a factor. (Emphasis added).

I find that other employees involved in this incident were guilty of the same degree of negligence under similar or equivalent circumstances. Except for ....., there is no rational basis for differentiating between some employees who received no punishment, and Grievant. We are faced with a single transaction with numerous transgressors whose respective punishments for equally negligent acts fall into two distinct categories: discharge, and nothing at all. This disparate treatment can fairly be characterized as "random and completely inconsistent." The evidence in this case shows that ..... and ..... suffered absolutely no discipline whatsoever for their roles in this episode. No evidence was introduced to explained the lapses of others, such as ACO ....., but the absence of such proof must accrue to the benefit of the Grievant. This is a discharge case and when the evidence shows the involvement of a number of people, almost all of whom received absolutely no discipline whatsoever, it is incumbent upon the employer to introduce evidence to show that the employer's disinclination to discipline the other employees involved is rational.

In evaluating proper cause or just cause for discipline, the Arbitrator must affirmatively find that a valid rule existed for the safe and efficient operation of the plant, the employee was aware of the rule, the employee violated the rule, that a fair and full investigation was made of the matter, that the discipline was proportionate to the offense, ***and that the grievant was treated as other individuals who violated like and similar rules. The burden of proof is upon the Company to affirmatively establish all of the above by a preponderance of the evidence.*** (Emphasis added). In re Briggs Division, JPI Plumbing Products Inc. 97 LA 386 (1991; Kilroy, Arb.)

There is yet a second reason why Grievant's punishment in this case is disparate. There was testimony that on April 26, 1997, the tool room door was found to have been left unlocked overnight. Yet, the persons found to have been responsible for that, ..... and ....., were merely reprimanded.

For the foregoing reasons I find that Grievant's discipline was disparate and discriminatory.

### **REMEDY**

There was a singular, but significant, blemish on Grievant's otherwise exemplary seven-year work record. It appears that in approximately December, 1993, or January, 1994, Grievant was suspended for a period of thirty days for smuggling a pair of tweezers and some bubble gum into the prison facility, with intent to give the items to an inmate. A rule which is designed to control the introduction of substances and implements into a prison is eminently reasonable, even if the items being smuggled in appear to be rather innocuous. Although the smuggling incident was a serious violation of departmental rules, it again is a different type of offense. In the instant case we are faced with a negligent act on the part of Grievant. Negligence has to do with failing to exercise due care in the performance of his job as opposed to a wilful violation of known rules. This was the Grievant's first instance of negligence on the job. This should be a situation where progressive discipline is appropriate.

Each case necessarily involves a careful consideration of the act in the context of the possibility of its recurrence, whether correction can be made, the attitude of the employee, his apparent desire to learn from this experience, and whether or not he has learned, the actual and potential injury caused the Company, . . . . the reasonableness of judgment by both Company and employee, the influence of the discipline upon other employees, . . . . the knowledge of the employee concerning the performance which is punishable by discharge, and the policy of discipline in the Company. *In re Ingalls Shipbuilding Corp., op. cit.* at 955.

As viewed by the Arbitrator, Grievant's action were unintentional and I believe that he has learned from this incident. Based on what was foreseeable at the time, only the most prescient of employees could have foreseen that the penalty for Grievant's actions would be discharge. Grievant's Job Performance Ratings over his seven years of employment were good. The narrative comments concerning his attitude, his job skills, his experience and knowledge gleaned from his years in the construction industry were excellent. I therefore conclude that the penalty of discharge was excessive punishment and that Grievant should have been subjected to progressive discipline.

There was one aspect of the Grievant's demeanor before this Arbitrator that should be mentioned, however. During the Grievant's pre-dismissal hearing Grievant and his union agent raised, for the first time, the argument that Grievant, prior to the occurrence of the incident for

which he was disciplined, had been stripped of his supervisory authority and that ..... was actually the supervisor in charge. At the arbitration hearing Grievant and his attorney persisted in advancing this argument. It is this arbitrator's opinion that while the evidence showed that Grievant was "out of the loop," it by no means excused him from his negligent conduct. There was convincing evidence that Grievant's new supervisor, ....., was an autocratic type of supervisor who unofficially rewrote the ..... Maintenance Division's organizational chart to permit him to micro-manage every aspect of the Division's operations. The practical effect of ..... 's new, de facto organizational chart resulted in Grievant's position being downgraded so that Grievant was required to obtain approval for even simple, routine actions within his sphere of authority. In many instances he was subjected to demeaning assignments. Understandably, these were stressful conditions that Grievant was required to labor under. However, the thrust of Grievant's case- that it was not Grievant's responsibility to follow up on ..... 's failure to return the tools because he had been totally stripped of all supervisory authority- was outrageously disingenuous. Moreover, Grievant's obstinate persistence in pursuing this theory led to some wildly incredible testimony on his part.

In light of the Grievant's disciplinable misconduct in the instant case, Grievant's prior discipline, and Grievant's disingenuous testimony in this proceeding, I find that a six month suspension without pay is an appropriate penalty for this Grievant's actions.

For all the foregoing reasons, the Arbitrator makes the following award.

### **AWARD**

The Grievance is granted in part and sustained in part.

Grievant's discharge is set aside and reduced to a six month suspension without pay. Grievant is reinstated to his former position, at his former rate of pay, effective from the date on which such six month suspension would have expired. Grievant is awarded back pay, benefits and seniority from his reinstatement date, less unemployment compensation benefits, and less any amounts earned through interim employment. The Grievant, the Union and the Employer shall attempt to arrive at a complete settlement of Grievant's claims. This arbitrator will retain jurisdiction over this grievance pending a resolution of all issues relating to back. In the event that the parties are unable to resolve the matter, it shall be promptly resubmitted to the Arbitrator herein for his determination.

DATED: Honolulu, Hawaii, November 6,1998.

T. David Woo, Jr.  
Arbitrator

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On this 6th day of November, 1998, before me personally appeared T. David Woo, Jr., to me known to be the person described in and who executed the foregoing instrument and acknowledge he executed the same as his free act and deed.

Lori A Cuban  
Notary Public, State of Hawaii

My commission expires: 10/26/99